

January 11, 2023

VIA EFILING ONLY

Shari Moore
City Clerk
City of St. Paul
310 City Hall
15 W Kellogg Blvd
Saint Paul, MN 55102
cityclerk@ci.stpaul.mn.us

**Re: *In the Matter of the Cigarette/Tobacco License Held by Moundsvie
Retail Inc. d/b/a Mounds Park Market for the Premises Located at 241
Earl Street in St. Paul
OAH 71-6020-38502***

Dear City Clerk Moore:

Enclosed and served upon you is the Administrative Law Judge's **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** in the above-entitled matter. The official record, along with a copy of the recording of the hearing, is also enclosed. The Office of Administrative Hearings' file in this matter is now closed.

If you have any questions, please contact me at (651) 361-7857, nichole.helmuelle@state.mn.us, or via facsimile at (651) 539-0310.

Sincerely,



NICHOLE HELMUELLER
Legal Assistant

Enclosure

cc: Docket Coordinator
Therese Skarda
Derek Thooft

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF ST. PAUL

In the Matter of the Cigarette/Tobacco License Held by Moundsview Retail Inc. d/b/a Mounds Park Market for the Premises Located at 241 Earl Street in Saint Paul

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

This matter came before Administrative Law Judge Jessica A. Palmer-Denig for a hearing on November 3, 2022, at the Office of Administrative Hearings in St. Paul, Minnesota. The record closed on November 18, 2022, upon receipt of the parties' written closing arguments.

Therese Skarda, Assistant City Attorney, appeared on behalf of the City of St. Paul (City) Department of Safety and Inspections (DSI). Derek Thooft, Thooft Law LLC, appeared on behalf of Moundsview Retail Inc. d/b/a Mounds Park Market (Licensee).

STATEMENT OF THE ISSUES

1. Has DSI established that Licensee violated St. Paul Legislative Code § 324.07(j) by selling, offering for sale, or otherwise distributing flavored tobacco products?
2. If so, may Licensee's Tobacco Shop License be revoked?

SUMMARY OF RECOMMENDATION

DSI has established that Licensee offered flavored tobacco products for sale in violation of the St. Paul Legislative Code. DSI also established that Licensee's license to sell tobacco products may be revoked pursuant to St. Paul Legislative Code § 324.10(b), as this is Licensee's second flavored tobacco violation within 24 months.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. The Parties

1. DSI is the agency within the City that licenses and regulates the sale of tobacco products in Saint Paul.¹ DSI provides educational materials to licensees, conducts inspections of businesses where tobacco products are sold, and investigates complaints against licensees.²

2. Licensee operates Mounds Park Market, which is a convenience store located at 241 Earl Street in Saint Paul.³ Akil Jahed is the owner of Licensee.⁴

3. Licensee holds a Tobacco Shop License issued by the City permitting it to sell tobacco products.⁵ The license was originally issued in 2017.⁶

4. Tobacco sales represent approximately 30 to 40 percent of Licensee's sales, with 60 to 70 percent of sales attributable to non-tobacco products, such as snacks and household supplies.⁷

II. 2019 Licensing Action

5. On June 27, 2019, DSI issued a Notice of Violation and Recommendation for Imposition of \$500 Matrix Penalty, notifying Licensee that it would seek adverse action against Licensee's license arising from a failed compliance check for flavored tobacco products on April 12, 2019.⁸ Specifically, DSI stated that tobacco licensees had been given prior notice that DSI would be conducting compliance checks, and that when an inspector visited Mounds Park Market, the inspector observed several different flavored tobacco products were being offered for sale.⁹

6. At a public hearing on October 2, 2019, Mr. Jahed appeared and explained that his distributor advised him that the products at issue were not flavored tobacco products, and he provided evidence that he returned the prohibited products to the distributor and obtained a refund.¹⁰

7. Based on the information before it, the City Council determined that the violation resulted from genuine confusion.¹¹ Therefore, the City Council stayed

¹ Testimony (Test.) of Eric Hudak.

² *Id.*; Test. of Joseph Voyda.

³ Exhibit (Ex.). 3 at 3-1; Test. of Akil Jahed.

⁴ Ex. 3 at 3-1; Test. of A. Jahed.

⁵ Test. of E. Hudak.

⁶ *Id.*; Ex. 5 at 5-1.

⁷ Test. of A. Jahed.

⁸ Ex. 15 at 15-2–15-4.

⁹ *Id.* at 15-2–15-3.

¹⁰ Ex. 15 at 15-14; Test. of A. Jahed.

¹¹ Ex. 15 at 15-14.

imposition of the \$500 penalty for one year provided that Licensee did not engage in violations that were the same or similar to the violation at issue.¹²

III. 2021 Licensing Action

8. On August 24, 2021, DSI issued to Licensee a Notice of Violation and Recommendation for Imposition of \$300 Administrative Penalty for Tobacco Youth Compliance Check Failure and \$500 Matrix Penalty for Selling Flavored Tobacco Products.¹³

9. DSI advised Licensee that the violation notice stemmed from a failed youth compliance check on July 13, 2021, in which Licensee sold cigarettes to an underage person and the clerk did not ask to see her identification.¹⁴ When the inspector went into Mounds Park Market to talk to the clerk, the inspector observed flavored tobacco products in plain sight.¹⁵ The inspector ultimately located over 30 different flavored tobacco products in Licensee's store, some of which were stocked in numerous flavors.¹⁶

10. Licensee paid the penalty amounts in full in September of 2021.¹⁷

IV. Amendment of the City's Tobacco Ordinance

11. In December 2021, the City Council amended St. Paul Legislative Code Chapter 324, which governs tobacco licensing.¹⁸

12. DSI provided written notice of the revisions to the tobacco ordinance to tobacco license holders.¹⁹

13. Among the changes DSI identified for license holders, the amendments increased the presumptive penalties for violations involving the sale of flavored tobacco products.²⁰

14. Under the amended ordinance, for a second appearance involving the display, possession, or multiple instances of the sale of flavored tobacco products, the presumptive penalty is revocation.²¹ A second violation within 24 months is considered to be a second appearance.²²

¹² *Id.* at 15-13–15-15.

¹³ Ex. 16 at 16-2.

¹⁴ *Id.* at 16-3, 16-7, 16-11; 16-13–16-14.

¹⁵ *Id.* at 16-14.

¹⁶ *Id.* at 16-14–16-15; 16-19–16-43.

¹⁷ *Id.* at 16-44; Test. of E. Hudak.

¹⁸ Ex. 12; Ex. 13 at 13-1.

¹⁹ Ex. 13, Ex. 14.

²⁰ Ex. 13 at 13-2; Ex. 14 at 14-2.

²¹ Ex. 14 at 14-2; St. Paul Legislative Code § 324.10(b).

²² Ex. 12-10; St. Paul Legislative Code § 324.10(d)(1).

V. The Current Violation Notice

15. On May 12, 2022, DSI Inspector Joseph Voyda conducted a complaint inspection at Mounds Park Market based on a complaint made to DSI that Licensee was selling flavored tobacco products.²³

16. Inspector Voyda spoke with the clerk on duty and conducted an inspection of the store.²⁴

17. Inspector Voyda found numerous flavored tobacco products, including products identified with fruit, honey, and liquor flavorings.²⁵ He discovered over 300 individual items qualifying as prohibited flavored tobacco products.²⁶ Approximately 60 percent of the tobacco products he found in the store were prohibited items.²⁷

18. Inspector Voyda found that some of the flavored tobacco items were being stored in boxes for other products like candy and apple sauce, under the clerk's counter, and in a tub or tote bin behind the counter.²⁸ Inspector Voyda believed that products were stored in this manner as an attempt at concealment.²⁹

19. When Inspector Voyda began the inspection, he was told that Mr. Jahed was in Iraq, but Mr. Jahed arrived while the inspection was underway.³⁰

20. Mr. Jahed traveled to Iraq in December 2021 to resolve issues related to a visa for his wife to travel to the United States.³¹ At the time he left, he believed that he would be in Iraq for a month or six weeks.³² Instead, he was in Iraq for six months due to issues he encountered in obtaining the visa and safety concerns arising from incidents of civil unrest in Iraq.³³

21. During Mr. Jahed's absence, he left the store in the keeping of his brother and several friends of their family.³⁴ In addition to Mr. Jahed's brother, two to three other

²³ Ex. 2 at 2-1, Ex. 17; Test. of Joseph Voyda.

²⁴ Ex. 2 at 2-1; Test. of J. Voyda.

²⁵ Ex. 2 at 2-2-2-6; Test. of J. Voyda.

²⁶ Ex. 2 at 2-2-2-6; Test. of J. Voyda.

²⁷ Test. of J. Voyda.

²⁸ Ex. 2 at 2-2-2-6; Test. of J. Voyda.

²⁹ Ex. 2-1; Test. of J. Voyda.

³⁰ Ex. 2 at 2-1; Test. of J. Voyda; Test. of A. Jahed.

³¹ Test. of A. Jahed.

³² *Id.*

³³ *Id.*

³⁴ *Id.* The family friends are not identified in the record. The employment status of these individuals related to Licensee's operations is somewhat unclear. The record suggests that these family friends may not have been employees of Licensee, but were present at Mounds Park Market as volunteers to assist Mr. Jahed, though they did exercise the ability to make product stocking decisions. *Id.*

individuals minded the store for him.³⁵ These individuals had experience running similar stores of their own.³⁶

22. Mr. Jahed did not give instructions to any employees or helpers about ordering tobacco products in his absence.³⁷ Instead, Mr. Jahed asked them to operate Mounds Park Market as they ran their own stores.³⁸ He assumed they would not order prohibited tobacco products.³⁹

23. During the time he was in Iraq, Mr. Jahed was unable to direct daily operations at Mounds Park Market or to make regular contact with those operating the store in his stead.⁴⁰

24. Mr. Jahed returned to Minnesota approximately 24 hours before Inspector Voyda's visit to Mounds Park Market.⁴¹ Between the time he returned to Minnesota and the inspection, Mr. Jahed had been at the Mounds Park Market only briefly to address issues related to a break in at the store.⁴²

25. When Inspector Voyda asked Mr. Jahed about prohibited items he found in the store, Mr. Jahed told Inspector Voyda that the products were for personal use.⁴³

26. On June 7, 2022, DSI issued a Notice of Violation and Request for Revocation of License (Notice of Revocation) notifying Licensee that it had determined a violation occurred and that it would pursue revocation of Licensee's license to sell tobacco products.⁴⁴ The Notice of Revocation advised Licensee that it could contest the proposed adverse action and request a hearing.⁴⁵

27. By letter dated June 15, 2022, Licensee notified DSI that it disputed the facts, contested the proposed adverse action, and requested a hearing.⁴⁶

28. Any Conclusion of Law more properly considered to be a Finding of Fact is incorporated herein.

29. Any portion of the Memorandum or fact contained therein that should be considered as a Finding of Fact is adopted as such.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Ex. 2 at 2-1; Test. of J. Voyda.

⁴⁴ Ex. 1.

⁴⁵ *Id.* at 1-3–1-4.

⁴⁶ Ex. 8.

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the City Council have authority to hear this matter pursuant to St. Paul Legislative Code § 310.05(c), Minn. Stat. § 14.55 (2022).

2. The hearing in this matter was conducted in accordance with St. Paul Legislative Code § 310.05 and the contested case procedures of Minn. Stat. §§ 14.57-.62 (2022).

3. DSI provided proper notice of the hearing and fulfilled all procedural requirements of rule and law.

4. DSI must show by a preponderance of the evidence that Licensee committed the alleged violation.⁴⁷

5. Under St. Paul Legislative Code § 324.07(j), no person may sell, offer for sale, or otherwise distribute any flavored tobacco products unless a specific exception identified in section 324.07(l) applies. No exception found in St. Paul Legislative Code § 324.07(l) applies here. Therefore, Licensee was prohibited from selling, offering for sale, or distributing flavored products.

6. DSI has established that Licensee violated St. Paul Legislative Code § 324.07(j) by offering prohibited flavored tobacco products for sale.

7. Because Licensee engaged in another flavored tobacco product violation within the preceding 24 months, the current violation constitutes Licensee's second appearance.⁴⁸

8. Under St. Paul Legislative Code § 324.10(b), the presumptive penalty for a second appearance related to the display, possession, or multiple incidents of sales of flavored tobacco products is revocation of Licensee's Tobacco Shop License.

9. DSI has shown that grounds exist for imposition of the matrix penalty of license revocation.

10. Any Finding of Fact more properly deemed a Conclusion of Law is incorporated herein.

11. Any portion of the accompanying Memorandum that is more properly considered to be a conclusion of law is adopted herein.

Based upon these Conclusions of Law, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:


⁴⁷ Minn. R. 1400.7300, subp. 5 (2021).

⁴⁸ St. Paul Legislative Code § 324.10(d)(1).

RECOMMENDATION

The City should find Licensee violated St. Paul Legislative Code § 324.07(j) and **REVOKE** Licensee's Tobacco Shop License.

Dated: January 11, 2023


JESSICA A. PALMER-DENIG
Administrative Law Judge

Reported: Digitally Recorded
No transcript prepared

NOTICE

This Report is a recommendation, not a final decision. The Saint Paul City Council will make a final decision after a review of the record and may adopt, reject, or modify these Findings of Fact, Conclusions of Law, and Recommendation. Pursuant to Saint Paul Legislative Code § 310.05 (c-1), the City Council shall not make a final decision until the parties have had the opportunity to present oral or written arguments to the City Council. Parties should contact the St. Paul City Clerk, 310 City Hall, 15 W. Kellogg Blvd., Saint Paul, MN 55102, to ascertain the procedure for filing exceptions or presenting arguments.

MEMORANDUM

The record establishes that Licensee offered flavored tobacco products for sale in violation of St. Paul Legislative Code § 324.07(j). The prohibited items were obviously flavored products, with packaging identifying flavors such as berries and cream, white peach sangria, and honey bourbon.⁴⁹ No valid argument can be made that the violation in this case resulted from confusion. Though Mr. Jahed informed Inspector Voyda that the prohibited products were for personal use, the sheer volume of flavored tobacco products on hand belies that assertion. Inspector Voyda found over 300 individual prohibited items and estimated that about 60 percent of all tobacco products in the store were prohibited products.⁵⁰

In response, Licensee offers explanations and seeks mitigation of the penalty to be imposed. Licensee asserts Mr. Jahed's ability to manage Licensee's compliance with tobacco regulations was compromised because he could not promptly return to

⁴⁹ Ex. 2-2-2-6.

⁵⁰ *Id.*; Test. of J. Voyda.

Minnesota from Iraq, and because he experienced difficulty communicating about the store while outside the country. Licensee contends that DSI employees who testified at the hearing have an incorrect understanding of the relevant ordinance. Finally, Licensee argues that revocation will result in irreparable harm to Mr. Jahed and his family. For these reasons, Licensee argues that suspension is the appropriate remedy, not revocation.

The record supports finding that Mr. Jahed was in Iraq until shortly before the inspection in May 2022. There is no evidence that Mr. Jahed personally ordered or authorized the sale of prohibited items found during the inspection. Yet, Mr. Jahed did not adequately provide for the direction and supervision of the store to ensure that Licensee operated lawfully in his absence. While he was in Iraq, his brother and several family friends operated the store.⁵¹ Mr. Jahed did not provide them with specific instructions about tobacco purchasing decisions or advise them not to offer flavored tobacco products while he was gone.⁵² Further, Licensee is a corporation and was required to operate within its license at all times, whether Mr. Jahed was present or not.

Licensee contends that Inspector Voyda misunderstands the flavored tobacco provision of the ordinance. This argument relates to testimony at the hearing regarding whether a violation could be found based on the presence of a prohibited item in the store, such as a flavored tobacco product accidentally left in a bathroom, even if the item was not offered for sale. Arguments about these hypothetical circumstances does not sway the outcome in this case because that is not the situation presented here. Instead, there were over 300 individual prohibited items stashed throughout the store, including on shelves, in snack food boxes, behind and under the clerk's counter, and in a tub on the floor. This was not a solitary incident or an accident.

Mr. Jahed testified that his family depends on Licensee's operations for financial support, and that tobacco products represent a substantial percentage of Licensee's sales.⁵³ Mr. Jahed believes that if Licensee's Tobacco Shop License is revoked the Mounds Park Market will be required to close.⁵⁴ The Administrative Law Judge does not doubt that loss of the license, and resulting financial consequences, will cause hardship for Mr. Jahed and his family. At the same time, the importance of Licensee's revenue to his family created a strong incentive for Mr. Jahed to actively manage Licensee in a manner that would have ensured lawful operation of the market, particularly after Licensee engaged in two prior flavored tobacco violations. As noted previously, Mr. Jahed did not take sufficient steps to ensure Licensee operated within the scope of its license.

Licensee engaged in a flavored tobacco violation in July 2021, making this case its second violation within 24 months. Under St. Paul Legislative Code § 324.10(d)(1), this case constitutes a second appearance. The presumptive matrix penalty for a

⁵¹ Test. of A. Jahed.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

second violation related to flavored tobacco products is revocation of the license.⁵⁵ In connection with recent amendments to the regulations related to tobacco licenses, the City Council expressed strong concerns about the use of tobacco products by young people, and the harmful impacts of smoking on Minnesota’s youth.⁵⁶ The City Council provided that licensees holding a Tobacco Shop License are those accessible to patrons under the age of 21, and that these licensees are authorized to sell more limited products as a result of that broader access.⁵⁷ The imposition of enhanced penalties, including revocation resulting from a second appearance, is consistent with the gravity of these concerns.

The City Council may deviate from the presumptive penalty if it finds “substantial and compelling reasons” support a deviation.⁵⁸ The Administrative Law Judge respectfully recommends that no such circumstances are present here. Licensee engaged in three violations related to flavored tobacco products between 2019 and 2022. While the City Council found that the first violation resulted from Mr. Jahed’s confusion, that is not a valid excuse for the subsequent violations. Further, Licensee’s current violation and the 2021 violation are separated by only ten months, showing that Licensee engaged in another violation despite the recent imposition of a penalty. Finally, the violation here is substantial, given that Inspector Voyda found over 300 prohibited items and the majority of tobacco products in the store were in violation of the ordinance.

The Administrative Law Judge notes that the record also contains evidence showing that Inspector Voyda found tobacco materials during the inspection that did not contain a tax stamp, and DSI made arguments related to this issue during the hearing. DSI did not identify the tax stamp issue, or any facts related to this concern, as a basis for adverse action in the Notice of Revocation. DSI also did not plead any facts regarding the absence of a tax stamp or identify this as an issue for the Administrative Law Judge’s decision in its hearing notice commencing this case.⁵⁹ Therefore, the Administrative Law Judge determines that issues related to the absence of a tax stamp are not properly before her. The Administrative Law Judge has not made findings on this point and has not relied on any evidence related to the absence of a tax stamp in making this recommendation.

The City Council should find that Licensee violated St. Paul Legislative Code § 324.07(j) by offering flavored tobacco products for sale. The City Council should impose the presumptive penalty and revoke Licensee’s Tobacco Shop License.

J. P. D.

⁵⁵ St. Paul Legislative Code § 324.10(b).

⁵⁶ Ex. 12 at 12-1–12-2.

⁵⁷ *Id.* at 12-1. In contrast, a Tobacco Products Shop License is for specialized stores selling tobacco products that can only be entered by individuals who are over age 21. *Id.*; St. Paul Legislative Code § 324.03(17).

⁵⁸ St. Paul Legislative Code § 324.10(a).

⁵⁹ See Notice of Prehearing Telephone Conference (July 14, 2022).